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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927.

No. 973

UNADILLA VALLEY RAILWAY COMPANY,
A Corporation, Petitioner,

vs.

ERNEST CALDINE, as Administrator of the Goods, Chattels, and Credits of Harold E. Caldine, Deceased.

PETITION FOR WRIT OF CERTIORARI.

BENJAMIN S. MINOR,
H. PRESCOTT GATLEY,
ARTHUR P. DRURY,
Attorneys for Petitioner.

WIRT HOWE,
Of Counsel.

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PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner, the Unadilla Valley Railway Company, a corporation, respectfully shows unto this Honorable Court:

1. Unadilla Valley Railway Company is a common carrier by railroad, operating a single track road,

1c

with switches, from Bridgewater to New Berlin, in the State of New York. It is engaged in interstate as well as intrastate commerce.

2. On the 25th day of June, 1924, one Caldine, a conductor in its employ, and in charge of one of its trains (R., pp. 48, 57), was killed in a head-on collision between the passenger train of which Caldine was conductor and a freight train of the railroad, at a point near Bridgewater, New York.

3. The administrator of the estate of Caldine brought suit in the Supreme Court of the State of New York against the railroad to recover damages caused by Caldine's death, basing his right of action upon the provision of the Federal Employers' Liability Act (35 Stat. L., 65), (R., pp. 3-8; 17-23).

4. The facts surrounding Caldine's death were briefly as follows: On the day of the accident Caldine was in charge of a railroad train of the company, operated by gas, known as train No. 2, which was due to leave Bridgewater at 8.10 in the morning, going south. One Dibble was the motorman of that train. Train No. 15, a freight train of the railroad company, in charge of one Risley as conductor, coming from the opposite direction, was due to arrive at Bridgewater at 8.00 in the morning.

Caldine, conductor of train No. 2, was under written instructions as follows: "Train No. 2 will pass train No. 15 in Bridgewater yard, and train No. 15 will take turntable siding at Bridgewater to allow train No. 2 to pass." These were permanent orders, not to be countermanded except by a signed order from the

Superintendent. No such countermanding order had been given (R., pp. 55-56; 146-147).

Shortly before train No. 15 reached Bridgewater, and just as it left a station known as River Forks, about two miles south of Bridgewater, Busley, its conductor, telephoned to the station agent at Bridgewater to hold train No. 2 until train No. 15 arrived at Bridgewater, and immediately proceeded to Bridgewater.

Dawson, the station agent at Bridgewater, claimed to have delivered this message to Dibble, the motorman of train No. 2 (R., p. 82), but this Dibble denied (R., p. 69). Dawson did not deliver the message to Caldine, conductor of No. 2 (R., p. 38).

Without waiting for train No. 15 to arrive at Bridgewater, Caldine gave the regular signal to the motorman to start train No. 2. The motorman started the train (R., p. 80) and it had proceeded but a short distance when it came into a head-on collision with train No. 15. As a result of the collision Caldine was killed.

5. The case was tried to a jury. Under the provisions of the Employers' Liability Act, providing for recovery of damages for death "resulting in whole or in part from the negligence of any of the officers, agents or employees" of a common carrier, the case was submitted to the jury for its determination upon the question of whether Caldine's death was due solely to his own negligence, or whether the negligence of the station agent, Dawson, in failing to deliver to him the message received over the 'phone from the conductor of train No. 15 was a contributing act of negligence (R., p. 180). The jury returned a verdict in favor of

the plaintiff for $2,200 (R., p. 103, 128). Judgment was entered upon the verdict and an appeal therefrom was taken to the Appellate Division. That court reversed the judgment of the trial court, holding that Caldine's death was "proximately and solely caused by his own negligence" (R., p. 145), and basing its opinion and judgment upon the decision of this Court in the case of Kennedy *vs.* Davis, Agent, 266 U. S., 147 (218 App. Div. N. Y., 5; 217 N. Y. Supp., 705).

From this judgment appeal was taken to the court of appeals of the State. That court, after reviewing the case, on November 22, 1927, rendered its opinion and judgment (not yet reported), reversing the judgment of the Appellate Division and affirmed the judgment in favor of the plaintiff in the trial court (R., p. 118). The basis of this holding was that the negligence causing Caldine's death was contributed to by Dawson, the station agent, and also by Dibble, the motorman of train No. 2, in obeying the signal to him to start the train. In support of this opinion and judgment the court of appeals cites the case of Kennedy *vs.* Davis, agent, *supra*.

6. The question here presented is a substantial one and an important one in the law of carriers. The opinion and judgment of the court of appeals virtually makes the carrier an insurer in this case. Not only does the record in the case show a conflict in the decisions of the courts of the State of New York, both supporting their judgments upon the decision of this Court in the case of Kennedy *vs.* Davis, *supra*, but we respectfully submit that the court of appeals has not

properly applied the decision in that case, and the decisions of this Court in other cases; and has upheld a recovery in damages in the face of the fact that Caldine's death was caused proximately and primarily by his starting the train in violation of written instructions, duly promulgated by the carrier governing the operation of the train.

WHEREFORE, your petitioner prays that a writ of certiorari may be issued out of and under the seal of this Honorable Court, directed to the Court of Appeals of the State of New York, commanding said court to certify and send to this Court a full and complete transcript of the record and of proceedings of said court in the case entitled "Ernest Caldine, as administrator of the goods, chattels and credits of Harold E. Caldine, deceased, plaintiff, appellant, against Unadilla Valley Railway Company, defendant, respondent," to the end that said cause may be reviewed and determined by this Court, as provided by law; and your petitioner prays that the judgment of the said Court of Appeals of the State of New York in said case may be reversed by this Honorable Court.

And your petitioner will ever pray.

UNADILLA VALLEY RAILWAY COMPANY,

By BENJAMIN S. MINOR,
H. PRESCOTT GATLEY,
ARTHUR P. DRURY,
Attorneys.

WIRT HOWE,
Of Counsel.

DISTRICT OF COLUMBIA, *ss:*

H. Prescott Gatley, being first duly sworn, says that he is attorney for the petitioner, Unadilla Valley Railway Company, a corporation; that he prepared the foregoing petition and that the allegations thereof are true as he verily believes.

H. PRESCOTT GATLEY.

Subscribed and sworn to before me this 17th day of February, 1928.

[SEAL.] NEENAH LAUB,
Notary Public, D. C.

We hereby certify that we have examined the foregoing petition for writ of certiorari, and that, in our opinion, it is well founded in point of law and should be granted by this Honorable Court, and that the petition is not filed for purpose of delay.

BENJAMIN S. MINOR,
H. PRESCOTT GATLEY,
ARTHUR P. DRURY,
Attorneys for Petitioner.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

ARGUMENT.

The facts in this case are practically undisputed. The sole question for determination is: Was the death of Caldine, conductor of train No. 2, caused solely by his own negligence, or was it due in whole or in part to the negligence of Dawson, the station agent, or to

that of Dibble, the motorman of the train, in obeying the signal given by Caldine to start the train, or the negligence of both of them?

Caldine, as conductor of train No. 2, was in entire charge of the train; the duty of giving orders for the movement of the train belonged to him; the engineer has no right to move the train except upon the orders from the conductor (R., pp. 48, 68, 71).

In this situation, Caldine, as conductor, was under written instructions as follows: "Train No. 2 will pass train No. 15 in Bridgewater yard, and train No. 15 will take turntable siding at Bridgewater to allow train No. 2 to pass."

In violation of these instructions, Caldine gave to the motorman the signal to move the train. The motorman obeyed the order and started the train. It had gone but a very short distance when the collision occurred. It is difficult to imagine a more palpable and flagrant act of negligence than this act of Caldine's. The motorman in starting the train in obedience to Caldine's signal to him to do so, clearly performed his *duty*, hence there was no negligence in so doing. Surely Caldine ought not to be heard to complain because of this performance of *duty* by the motorman, pursuant to his, Caldine's, express orders. The Court of Appeals, however, holds as matter of law, that the motorman of the train should not have obeyed this signal, and his failure to refuse to obey the starting signal was a breach of duty on his part, which constituted negligence contributing proximately to Caldine's death. We submit this holding is erroneous

and based upon fallacious reasoning, and is a most dangerous one, for, if an engineer of a train can, at will, violate the signal of a conductor in charge of the movement of a train, as Caldine was in this case (R., pp. 48, 58, 71), the safety of employees of the carrier, and the safety of the traveling public as well, would be jeopardized to the greatest degree.

The failure of the station agent to deliver the message to Caldine cannot, we submit, constitute negligence, for had he done so it would have amounted to nothing more than saying to Caldine "obey your written instructions!"

Even assuming the acts of Dawson, the station agent, and of Dibble, the motorman, to be negligent, we submit that they did not contribute in a proximate way to Caldine's death.

If the death of Caldine was caused by his own negligence, no recovery could be had. Was his negligence the primary, proximate cause of his death? The answer seems plain, for it was his act, done in violation of written instructions, that set in motion the instrument of death, and from the time that act was performed by him to the time of the collision, resulting in his death, there was no intervening negligent act on the part of any of the "officers, agents or employees" of the company that contributed in any degree to the accident.

As said by Mr. Justice McKenna in speaking for this Court in the case of Great Northern Railroad Company vs. Miles, 240 U. S., 444, 448:

> "In the present case there was nothing to extenuate Miles' negligence; there was nothing to

> confuse his judgment or cause hesitation. His duty was as clear as its performance was easy. He knew the danger of the situation and that it was imminent."

We think the Appellate Division was correct in holding that no recovery could be had in this case, and in basing that holding upon the decision of this Court in the case of Kennedy's Administratrix *vs.* Davis, Agent, 266 U. S., 147 (218 App. Div. N. Y., 5; 217 N. Y. Supp., 705; R., p. 1464). That was a collision case, and recovery was sought under the provisions of the Employers' Liability Act, for the alleged negligent death of the engineer of one of the trains. The accident occurred near a point known as Shops, which was two and one-half miles west of Nashville, Tennessee, when trains No. 1 and No. 4 came into collision. The tracks were double from Nashville to Shops, but after that the track was single. No. 1, bound for Nashville, had the right of way, and the crew of No. 4, bound westward, had instructions never to pass Shops unless they knew in fact that No. 1 had passed it. Kennedy was the engineer of No. 4. The conductor had told him that the train was crowded and had asked him to look out for No. 1, which Kennedy agreed to do. He ran his train on beyond Shops, however, and the collision occurred.

Plaintiff obtained a judgment, which was sustained by the Supreme Court of Tennessee, on the ground that the other members of the crew, as well as the engineer, were bound to look out for the approaching

train, and that their negligence contributed as a proximate cause to the engineer's death.

In reversing the judgment, this Court, speaking through Mr. Justice Holmes, says:

> "It was the personal duty of the engineer positively to ascertain whether the other train had passed. His duty was primary, as he had physical control of No. 4, and was managing its course. It seems to us a perversion of the statute to allow his representative to recover for an injury directly due to his failure to act, as required, on the ground that possibly it might have been prevented if those in secondary relation to the movement had done more." (Frese vs. Chicago, Burlington & Q. R. R. Co., 263 U. S., 1, 3.)

It needs no argument to apply the holding in the Kennedy case to the undisputed facts in the instant case.

To hold the company liable in damages for Caldine's death is tantamount to holding that the company, as a carrier, was an insurer of his safety. This was never contemplated by the provisions of the Employers' Liability Act.

> "While the Employers' Liability Act was manifestly intended to modify the law as it formerly existed, so as to materially benefit those who might be injured in the future by abolishing the harsh rule known as the 'Fellow Servant Doctrine,' yet it cannot be reasonably insisted that it was the purpose of the Act to afford relief where one's injury is due solely to

his own reckless and indifferent conduct." (Virginian Ry. Co. vs. Linkous, 230 Fed., 88, 93.)

Conclusion.

It is respectfully submitted:

1. The Court of Appeals of New York, by its opinion and judgment in this case, extends beyond reason the provisions of the Employers' Liability Act, and that in so doing, misconstrues and misapplies the fundamental principles underlying the law as determined and announced by this Court.

2. The judgment complained of is erroneous and in violation of the rights of petitioner, and should be corrected.

3. For the purpose of reviewing said judgment and correcting the error therein, a writ of certiorari should issue as prayed.

BENJAMIN S. MINOR,
H. PRESCOTT GATLEY,
ARTHUR P. DRURY,
Attorneys for Petitioner.

WIRT HOWE,
Of Counsel.